

ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
JUDGE DAVID M. GLOVER

DIVISION IV

CA08-1011

May 6, 2009

A.L., A MINOR

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

APPEAL FROM THE WASHINGTON
COUNTY CIRCUIT COURT,
[J2008-434-3]

HONORABLE STACEY A.
ZIMMERMAN, JUDGE

AFFIRMED

Appellant, A.L., brings this interlocutory appeal pursuant to Arkansas Code Annotated section 9-27-318(l) (Repl. 2008), which allows for the appeal of an order transferring a juvenile to the criminal division of circuit court. A.L. was fifteen years old on the date of the alleged offense. He was charged first with unlawful discharge of a weapon from a vehicle, but the charge was later amended to being an accomplice to a terroristic act. He raises two points: 1) that the trial court erred in transferring his case to the criminal division of the circuit court; and 2) that even if the transfer was proper, the trial court should have granted his request for a mental evaluation before holding the transfer hearing. A.L. asks that this matter be reversed and remanded with orders that his case be tried in juvenile court. We affirm.

The charges against A.L. arose from an incident in which three shots were fired into Leslie Santiago's home on February 8, 2008. She was in the living room with her three-year-old grandchild, and her son, Angel Murphy. One bullet passed within inches of the grandchild and Murphy, who told police that he saw a car with six people in it. Casings at the scene indicated that the shooter was outside the car while firing. Under questioning by police, A.L. admitted that the gun used in the shooting was his, that he knew what it was going to be used for, and that he and Julio Casper "went in and just sho[t]." A.L. did not deny being a gang member. He showed police his gang signs with his hands, indicated that the shooting was a retaliatory act, and called Murphy a "b****" who "talk[ed] a lot of s***." Police never found Casper or any of the other people reported to be in the car.

Standard of Review

When reviewing the circuit court's ruling on a motion to transfer, we will not reverse unless the circuit court's decision is clearly erroneous. *See, e.g., Williams v. State*, 96 Ark. App. 160, 239 S.W.3d 44 (2006) (affirming the denial of a motion to transfer from criminal to juvenile divisions of circuit court). A finding is clearly erroneous when, although there is evidence to support it, the appellate court after reviewing the entire evidence is left with the definite and firm conviction that a mistake has been committed. *R.M.W. v. State*, 375 Ark. 1, --- S.W.3d ---- (2008).

Decision to Transfer

For his first point of appeal, A.L. contends that the trial court erred in transferring his case to the criminal division of circuit court. His primary contention is that the trial court did not consider all of the required statutory factors in deciding whether to transfer his case out of juvenile court to criminal court. Arkansas Code Annotated section 9-27-318(g) (Repl. 2008) specifies that the circuit court shall consider all of the following factors in the transfer hearing:

- (1) The seriousness of the alleged offense and whether the protection of society requires prosecution in the criminal division of circuit court;
- (2) Whether the alleged offense was committed in an aggressive, violent, premeditated, or willful manner;
- (3) Whether the offense was against a person or property, with greater weight being given to offenses against persons, especially if personal injury resulted;
- (4) The culpability of the juvenile, including the level of planning and participation in the alleged offense;
- (5) The previous history of the juvenile, including whether the juvenile had been adjudicated a juvenile offender and, if so, whether the offenses were against persons or property, and any other previous history of antisocial behavior or patterns of physical violence;
- (6) The sophistication or maturity of the juvenile as determined by consideration of the juvenile's home, environment, emotional attitude, pattern of living, or desire to be treated as an adult;
- (7) Whether there are facilities or programs available to the judge of the juvenile division of circuit court that are likely to rehabilitate the juvenile before the expiration of the juvenile's twenty-first birthday;
- (8) Whether the juvenile acted alone or was part of a group in the commission of the alleged offense;

(9) Written reports and other materials relating to the juvenile's mental, physical, educational, and social history; and

(10) Any other factors deemed relevant by the judge.

In addition, the statute requires the court to make written findings on all ten factors, and it specifies that an order of transfer be based upon a finding by clear and convincing evidence that the case should be transferred. Ark. Code Ann. § 9-27-318(h)(1) and (2) (Repl. 2008).

In arguing that the trial court erred in transferring his case, A.L. specifically contends that the trial court did not consider the fourth factor, *i.e.*, “the culpability of the juvenile, including the level of planning and participation in the alleged offense,” pursuant to Arkansas Code Annotated § 9-27-318(g)(4), and that the trial court did not make written findings as required by Arkansas Code Annotated § 9-27-318(h)(1). A.L.’s argument is not preserved for appeal because he did not raise it below. *See Williams, supra* (refusing to address the circuit court’s failure to make written finding on factor seven because Williams did not object below).

Moreover, were we to address this point, we would reject A.L.’s argument in light of the following statement by the circuit court:

Number four, the culpability of the juvenile including the level of planning and participation in the alleged offense. Now on this one your attorney argues that your statements that you made to the police should have been suppressed or should be suppressed, and that’s for the Court to determine at another hearing. But without even getting into the statements made to the police, the first three factors that I’ve already looked at weigh in favor of sending you to adult court. So I’m not gonna even get into the statements that you made to the police.

This passage, appearing in the hearing transcript that was incorporated into the transfer order, reflects that the court considered culpability but declined to consider A.L.'s statements to police because of his pending request that the statements be excluded from the hearing.¹ The court effectively concluded that there was no competent evidence at that point on the fourth factor. A finding that there is no evidence with regard to a factor is not the same as declining to consider it, particularly because proof need not be introduced against the juvenile on each statutory factor and the circuit court is not required to give each factor equal weight in arriving at its decision. *Richardson v. State*, 97 Ark. App. 52, 244 S.W.3d 736 (2006). Therefore, even if this issue had been preserved, it would provide no basis for reversal.

Request for Mental Evaluation

As his final point of appeal, A.L. contends that the circuit court erred by conducting the transfer hearing before granting his request for a mental evaluation. A day before the hearing, A.L. filed notice that he intended to rely upon the defense of mental disease or defect. On the day of the hearing, he orally requested that the court suspend proceedings and send him to the state hospital for evaluation to determine if he was fit to proceed before ruling on the transfer issue. The trial court declined to do so, and proceeded with the hearing. The court noted that A.L. had been detained and that Arkansas Code Annotated § 9-27-318(f) mandated that the court “*shall* conduct a transfer

¹This suppression request was eventually denied.

hearing within thirty (30) days if the juvenile is detained . . . from the date of the motion to transfer the case.” (Emphasis added.)

A.L. argues on appeal, as he did below, that the circuit court was obligated to halt proceedings and to order a mental evaluation in order to determine his fitness to proceed. He points to the provision of Arkansas Code Annotated § 9-27-502(a)(1) (Repl. 2008) that § 5-2-301 *et seq.* applies in any juvenile delinquency proceeding in which the juvenile’s fitness to proceed is put in issue. A.L. relies upon the following portion of Ark. Code Ann. § 5-2-305 (Supp. 2007), entitled “Mental health examination of defendant”:

(a)(1) Subject to the provisions of §§ 5-2-304 and 5-2-311, *the court shall immediately suspend* any further proceedings in a prosecution if:

(A) A defendant charged in circuit court files notice that he or she intends to rely upon the defense of mental disease or defect;

. . . .

(b)(1) Upon suspension of further proceedings in the prosecution, the court shall enter an order:

(A) Directing that the defendant undergo examination and observation by one (1) or more qualified psychiatrists or qualified psychologists;

(B) Appointing one (1) or more qualified psychiatrists not practicing within the Arkansas State Hospital to make an examination and report on the mental condition of the defendant; or

(C) Directing the Director of the Division of Behavioral Health of the Department of Human Services to determine who will examine and report upon the mental condition of the defendant.

(Emphasis added.)

A.L. asserts that the circuit court erred in assessing the mandatory requirement of the juvenile-transfer statute alone rather than the mandatory nature of both statutes. The

State takes the position that this claim cannot be entertained as part of an interlocutory appeal pursuant to Arkansas Code Annotated § 9-27-318(l), which provides only that any party may appeal an order granting or denying the transfer. We are unpersuaded. The mental-examination issue was fairly encompassed in the transfer proceedings before the trial court and is therefore properly before our court as part of this interlocutory appeal from the transfer order. The State also contends that this issue was rendered moot by some post-transfer developments: the circuit court eventually ordered, and A.L. eventually received, his requested mental evaluation, and A.L. says in his appeal briefs that he no longer contends that he is an incompetent person. We disagree with this argument, too.

As a general rule, appellate courts of this state will not review moot issues; doing so would be to render an advisory opinion, which the appellate courts will not do. *Sanford v. Murdoch*, 374 Ark. 12, ____ S.W.3d ____ (2008). A case becomes moot “when any judgment rendered would have no practical legal effect upon a then-existing legal controversy.” *Id.* at 17, ____ S.W.3d at _____. There are two exceptions to the mootness doctrine: (1) issues that are capable of repetition, yet evading review, and (2) issues that raise considerations of substantial public interest which, if addressed, might prevent future litigation. *Id.* We conclude that the situation presented here falls under both of these exceptions. Whether the denial of a juvenile’s request for a mental evaluation prior to a transfer hearing was proper is an issue that is definitely capable of repetition. Yet, the issue would evade review if we were to conclude that providing a

later mental evaluation renders it moot. In addition, procedures involving juveniles within our judicial system, particularly juveniles who may be experiencing mental problems, raise considerations of substantial public interest. Our resolution of this issue concerning mental evaluations at the transfer stage of those proceedings may prevent future litigation. Therefore, we address the issue.

In making his argument, A.L. contends that the mental-evaluation statute is mandatory, that it should have been followed in this case, that the trial court erred as a matter of law in denying his request for a mental evaluation prior to the transfer hearing, and that his case should therefore be reversed and remanded to juvenile court. We agree that the two statutory mandates may collide in some cases. The calendar may make it impossible to comply with both statutory “shalls.” We decline to reverse on this basis, however, because of the circumstances presented in this case.

The ninth statutory factor listed in section 9-27-318(g) (Repl. 2008) requires the trial court to consider “written reports and other materials relating to the juvenile’s *mental*, physical, educational, and social *history*[.]” (Emphasis added.) In light of this factor and, more particularly, in light of A.L.’s willingness in this case to postpone the thirty-day time limit imposed upon trial courts to conduct transfer hearings if the juvenile has been detained, we do not hesitate in concluding that the trial court should have postponed the transfer hearing and ordered the evaluation. The thirty-day time limit set forth in Arkansas Code Annotated section 9-27-318(f) (Repl. 2008) for transfer hearings is mandatory, but it is not jurisdictional. Consequently, it can be waived by the juvenile,

which is what A.L. was willing to do here. That does not mean, however, that we agree with A.L.'s contention that the trial court's refusal to postpone the transfer hearing in this case requires that we reverse and remand to juvenile court.

While in most circumstances, a juvenile's mental-health evaluation might be essential in assisting a trial court to make its transfer decision, in this case it was not. The trial court was very familiar with A.L., having handled both his Family in Need of Services (FINS) case and his delinquency case. The delinquency case had four revocations, and A.L.'s probation officer testified that many rehabilitative services had been offered to the juvenile and his family. The trial court noted that A.L. had a learning disability, for which he had received special education, but that he was not low-functioning. Accordingly, on the facts before us, in light of the testimony, exhibits, and the circuit court's experience with A.L., an evaluation by the state hospital was not essential to aid the court in reaching its transfer decision.

It is clearly the intent of Arkansas Code Annotated section 5-2-305 to suspend criminal proceedings involving any person, juvenile or adult, "while incompetent to understand the nature of the procedures involved and to assist in the defense thereof," or one "who lacks the capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law at the time of the offense." See *Ball v. State*, 278 Ark. 423, 427, 646 S.W.2d 693, 696 (1983) (discussing a prior codification of the statute). The mental evaluation may provide important and relevant evidence on several of the transfer factors, including the juvenile's culpability and mental history. Here, the circuit

court's long experience with A.L. provided a sufficient evidentiary foundation for the transfer decision. Moreover, A.L.'s competency was evaluated prior to a trial or adjudication, though after his case was transferred to circuit court, and he no longer contends that he is incompetent. Thus, A.L. was not prejudiced in any fashion by the manner in which the trial court handled his request for a mental evaluation. Therefore, this point of appeal provides no basis for reversal.

Affirmed.

MARSHALL, J., agrees.

GRUBER, J., concurs.

GRUBER, J., concurring. I agree that the juvenile division of the circuit court did not err in transferring this case to adult court, nor did it err in denying the juvenile's request that a mental evaluation be conducted before the court held the transfer hearing. I write separately to express my disagreement with the majority's viewpoint that a juvenile in detention, by requesting a mental evaluation, can waive the clear requirement of Ark. Code Ann. § 9-27-318(f) (Repl. 2008) that a transfer hearing must be conducted within thirty days after it is requested.

Arkansas Code Annotated section 9-27-318(c)(1) gives a prosecutor the discretion to charge a juvenile in either the juvenile or criminal division of circuit court if the juvenile was at least sixteen years old at the time of the alleged conduct. When the charge is terroristic act, the discretion to file in either the criminal or juvenile division extends to

an accused who was fourteen or fifteen when the alleged act was committed. Ark. Code Ann. § 9-27-318(c)(2)(G). When a delinquency petition or criminal charge has been filed and a transfer hearing is requested, the court shall conduct the hearing within thirty days, if the juvenile is detained, from the date of the motion to transfer. Ark. Code Ann. § 9-27-318(f).

Our legislature has decreed that the juvenile code shall be liberally construed to the end that its purposes may be carried out. Ark. Code Ann. § 9-27-302 (Repl. 2008). Those purposes include ensuring the health and safety of a juvenile who is removed from the home. Ark. Code Ann. § 9-27-302(2)(c). Arkansas Code Annotated section 9-27-327(b) (Repl. 2008) limits the amount of time in detention as follows:

If a juvenile is in detention, an adjudication hearing shall be held, unless the juvenile or a party is seeking an extended juvenile jurisdiction designation, not later than fourteen (14) days from the date of the detention hearing unless waived by the juvenile or good cause is shown for a continuance.

A juvenile has a due-process right to have his competency determined *prior to adjudication*. *Golden v. State*, 341 Ark. 656, 21 S.W.3d 801 (2000) (emphasis added). Prior to 2001, mental disease or defect defenses were not available to juveniles. See *B.C. v. State*, 344 Ark. 385, 40 S.W.3d 315 (2001);² *Golden, supra*. By Act 987 of 2001, the legislature amended the juvenile code by adding the provision now codified at Ark. Code Ann. § 9-27-325(k) (Repl. 2008): “In delinquency proceedings, juveniles are entitled to all defenses

²The *B.C.* court found that the appellant did not preserve for appeal his argument that Act 1192 of 1999’s provision of an insanity defense for only some juveniles violated equal protection by drawing a distinction between different classes of juveniles. 344 Ark. at 390, 40 S.W.3d at 319.

available to criminal defendants in circuit court.” Thus, the legislature amended the juvenile code, Ark. Code Ann. § 9-27-325(k), to allow the defense of mental disease or defect.

When a transfer motion is pending in the juvenile division of circuit court, assertion of the right to such a defense does not automatically trigger the requirement of section 5-2-305(a)(1) (Repl. 2008) “to immediately suspend any further proceedings in prosecution.” When a juvenile under thirteen years of age is charged with capital murder or murder in the first degree, pursuant to the extended juvenile jurisdiction provision of the code, there is a presumption of unfitness or incapacity; the court shall order the evaluation to be performed, and all proceedings shall be suspended upon issuance of the order. Ark. Code Ann. § 9-27-502(b)(1) & (2) (Repl. 2008). Otherwise, a juvenile defendant is competent and entitled to all defenses available to adults in circuit court. Ark. Code Ann. § 9-27-325(k).

The entire process and purpose of the juvenile code set it apart from the criminal code. *Vanesch v. State*, 343 Ark. 381, 389, 37 S.W.3d 196, 201 (2001). The purpose of juvenile transfer hearings is to determine whether to transfer the case to another division of circuit court under Ark. Code Ann. § 9-27-318(e), which allows appeals only of the transfer order and not of other matters. *See Witherspoon v. State*, 74 Ark. App. 151, 46 S.W.3d 549 (2001) (stating that this court may not consider the denial of a motion to suppress on appeal from the denial of a motion for transfer). A court’s order on whether to transfer a juvenile’s case is subject to an interlocutory appeal, while denial of a mental

evaluation under Ark. Code Ann. § 5-2-305 is not. All of the defenses available to A.L. continued into adult circuit court when his case was transferred by the juvenile circuit court. An extended stay in juvenile detention was averted by complying with the mandatory statutory timetable to hear transfer cases within thirty days.

The Arkansas legislature could amend section 9-27-502 and require that a mental evaluation be performed prior to the conduction of a transfer hearing and that the proceedings be stayed. However, no such mandatory requirement currently exists. By writing this concurrence today, I am not suggesting that there will never be instances when a trial judge will order a mental evaluation and it will be performed, written, and available prior to a transfer hearing. Practically, however, these reports are rarely available within the time restraints of the juvenile code. I would affirm the present case without suggesting that the thirty-day time limit for conducting a transfer hearing from juvenile court can be waived.